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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 668

CLAUDE MACK,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. _____

CLAUDE MACK,

Petitioner.

—against—

LEHIGH VALLEY RAILROAD COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Opinions Below

The opinion of the United States District Court for the District of New Jersey is not officially reported.

The opinion of the Court of Appeals for the Third Circuit in this case is reported at 283 F. 2d 405.

Jurisdiction

The judgment of the Court of Appeals for the Third Circuit was filed on October 24, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Does a State Statute, which provides as follows (applicable excerpt from New Jersey Revised Statutes, 48:12-152):

> "It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway. Any person injured by an engine or car while walking, standing or playing on a railroad * * * shall be deemed to have contributed to the injury sustained and shall not recover therefor any damages from the company owning or operating the railroad. This section shall not apply to the crossing of a railroad by a person at any lawful public or private crossing."

grant immunity from liability to a railroad which amputates the leg of a helplessly-drunk person, lying with one leg across the track, in full view of the train crew, in broad daylight, at an area where the Trial Court accepted as true the fact that the railroad had "knowledge of practice of members of the public in all stages of sobriety to go and be upon this strip of land along the railroad track * * *" (117a), and where the Trial Court accepted as true "that there was an implied invitation or a license by reason of the custom and practice of members of the public to make use of this grass plot between the track and Canal Street for its use for play, traversing on foot; lying around, drinking, et cetera * * *" (116a, 117a)?

2. Is a person a trespasser, as a matter of law, if he ventures upon railroad property abutting the public highway, unfenced and otherwise open, where such practice had been indulged in by the public at large, including children, for many years, without protest by the railroad and without any indication that the railroad had any objection to the public using said property?

3. If while the locomotive of a train is actually traversing a public highway, the rear car some distance away, and strikes a person not actually at the public highway, under such circumstances, does that part of the New Jersey Revised Statutes grant immunity from liability to the railroad for negligence?

Reasons for Granting the Writ

1. There is conflict of decision between the Court below, which has held that the petitioner was a trespasser, as a matter of law, where other Courts have held the railroad liable under similar circumstances. See:

Jones v. *Atlant[illegible]harlotte Air Line R.R. Co.*, 218 S. C. 537, 33 S. E. 2d 476;

Murphy v. *Wabash R.R. Co.*, 228 Missouri 56, 128 S. W. 481, 487;

Brooks v. *Terminal R.R. Assoc.* (Missouri), 276 S. W. 2d 600, 606;

Smith v. *Boston & Maine R.R.*, 87 N. H. 246, 177 Atl. 729, 735;

Francis v. *Baltimore & Ohio R.R. Co.*, 247 Pa. 425, 93 Atl. 490, 491.

2. The New Jersey Revised Statutes (48:12-152), as applied by the Court below gives special privileges to railroads not granted to others and, therefore, such statute is invalid and in violation of the Constitution of the United States and of New Jersey, as destroying the civil right of an injured person to be indemnified by a tort feasor for wrongful and negligent acts short of wanton and wilful conduct.

3. It is common knowledge that the words "wilful" and "wanton" have been given such varied and conflicting interpretations, seemingly each Court giving its own independent version of its legal significance, that it is of gen-

eral concern and of the utmost importance that an authoritative Court, such as the Supreme Court of the United States, should express the legal significance and meaning of such words in a personal injury or death action, so that choice of forum or fortuitous personal opinions of different Judges be no longer the only legal measure of liability, and thus obviate the costly and conflicting opinions on the same set of facts on the chance of who happens to be the presiding Judge in a particular case, or which happens to be the forum of trial.

Statement

Petitioner, CLAUDE MACK, suffered an amputation of his right leg while he was lying helpless with his leg across a railroad track.

The accident took place in Jersey City, in the vicinity of Jersey Avenue and Canal Street on September 6, 1958, at 12:42 noon.

Respondent's train, about two hundred feet long, had been pushed east to Jersey Avenue by an engine which was coupled at the easterly end. Before resuming motion, several crew members alighted to the ground to make certain that it was safe for the train to cross Jersey Avenue. This was in accordance with the standard of care established by the respondent itself.

The day was clear and petitioner could have been seen by the crew had they looked before restarting the train.

Actually the front part of the train was using the public highway, Jersey Avenue, when the rear of the train, which had crossed Jersey Avenue, struck the petitioner who was some 150 feet east of Jersey Avenue and about 30 feet south of Canal Street.

No crewman was at the rear of the train to look in the direction it was moving.

The Trial Court accepted as true:

1. That the area at which the accident occurred was impliedly open to the public (117a).

2. That persons in similar condition to petitioner made it a commonly known practice to sleep and otherwise be present at the area in question (101a).

The element of time and distance, adequate for the respondent to have avoided a foreseeable accident to a helpless person, having been established by adequate proof, it is respectfully submitted that the learned Court below was in error in affirming as a matter of law the Trial Court's finding, that the petitioner had failed to meet his burden of proof, presenting a *prima facie* case.

The Evidence

The *locus* of the occurrence was about 150 feet east of Jersey Avenue and about 30 feet from Canal Street (34a). There is a tow path running alongside the northerly rail and the witness, Hill, in the course of a five day week, saw people two or three times using the said tow path (36a). P-2 shows where the petitioner was lying when the police reached the scene (39a). There is no fence separating the area from Canal Street (40a). It frequently happened that one or two people were usually walking along the area where the tracks are and lots of drunks usually build a fire there and use it for sleeping (46a). Dennis, an employee of the defendant, in charge of the crew, saw people in the area at different times (59a). From the curb of Canal Street to the tracks is about 30 feet (61a) and people walked up railroad property for years, walking up and down the tow path, which is about two feet from the tracks (63a). This was going on for a period of at least ten years (71a). Children crossed the tracks every day in the week (72a). The Trial Court found that, it had been shown, however, without question, that persons in various states

of sobriety, wakelessness and ability to care for themselves made a practice of lounging or lying or sleeping or being in the area near the tracks (101a).

At the close of the petitioner's case, the Trial Court granted respondent's motion to dismiss the action, and the Court below affirmed, *per curiam*, the decision of the Trial Court.

Preliminary Statement

The Trial Court as its primary basis for granting the judgment of dismissal, relied on a certain section of the New Jersey Revised Statutes and upon a New Jersey Supreme Court case decided March 2, 1959. Accordingly, it is deemed advisable to set forth the said statute in full and give complete reference to the case relied upon.

New Jersey Revised Statutes 48:12-152 provides as follows:

> "It shall not be lawful for any person other than those connected with or employed upon the railroad to walk along the tracks of any railroad except when the same shall be laid upon a public highway. Any person injured by an engine or car while walking, standing or playing on a railroad or by jumping on or off a car while in motion shall be deemed to have contributed to the injuries sustained and shall not recover therefor any damages from the company owning or operating the railroad. This section shall not apply to the crossing of a railroad by a person at any lawful public or private crossing."

See *Egan v. Erie Railroad Co.*, 29 N. J. 243, 148 Atl. 2d 830 (Sup. Ct. March 2, 1959).

POINT I

The statute is inapplicable to the petitioner because of the implied invitation extended to him by the defendant to use the tracks and land surrounding the same.

The Court below acknowledged as one of the facts proven by the petitioner that persons in various states of sobriety, wakelessness and ability to care for themselves, made a practice of lounging or lying or sleeping or being in the area near the track and he believed that to be shown in this case without question (101a).

He also concluded that there was an implied invitation or a license by reason of the custom and practice of men the track and Canal Street for its use for play, traversing on foot, lying around, drinking, etc. (117a).

> "The effect of the statute is to absolve a railroad company from a duty to a trespasser." *Egan* v. *Erie Railroad Company*, 148 Atl. 2d 832.

The petitioner, however was not a trespasser.

There was sufficient proof that the area where the accident occurred had been frequented by the public for many years; that there were no signs of any kind indicating that this was railroad property; that there were several well defined, well-worn foot paths in the area around, on and about the tracks which had been traversed continuously by the public. Under these facts the land owned by the railroad had impliedly been held out for use by the general public. *Black* v. *Central Railroad Co.*, 85 N. J. L. 197, 89 Atl. 24 (E. & A. 1913); *Webb* v. *West Jersey Railroad Co.* 100 N. J. L. 204, 126 Atl. 659 (Sup. Ct. 1924); *Corrao* v. *West Jersey Corp.*, 13 N. J. Super. 342, 349; 80 A. 2d 439, 442 (App. Div. 1951).

The theory of implied invitation has been most succinctly stated in *Furey* v. *N. Y. C. & H. R.R. Co.*, 67 N. J. L. 270, 51 Atl. 505 (E. & A. 1902), wherein the Court stated, 51 Atl. at 506:

> "* * * Its essence is that the defendant knew or ought to have known that something that he was doing or permitting to be done might give rise in an ordinarily discerning mind to a natural belief that he intended that to be done which his conduct had led the plaintiff to believe that he intended * * *."

POINT II

The finding by the Court below, as a matter of law, that there was no evidence of wilful and wanton conduct, is in conflict with other decisions, including decisions by New Jersey courts, where similar facts have been held to constitute wilful and wanton conduct.

In *Kowalesky* v. *Pennsylvania R. Co.*, 103 F. 2d 827, the court stated at page 829 (3rd Cir. 1939):

> "(4, 5) Contributory negligence of the plaintiff, however, does not bar recovery in an action for willful or wanton injury, sometimes as in this case improperly called willful or wanton negligence. Decou v. Dexheimer, N. J. Sup., 73 A. 49; Restatement, Torts, secs. 481, 482. For such injuries it appears that railroad companies in New Jersey are liable to trespassers on their tracks in spite of the broad language of Section 55. Hess v. Atlantic City R. Co., 95 N. J. L. 494, 113 A. 133; Kaproli v. Central R. of N. J., 105 N. J. L. 225, 143 A. 343, 60 A.L.R. 1430; Erie R. Co. v. Hilt, supra."

page 830:

> "If the engineer had seen or known that the boys were in a position of inescapable danger, he would clearly

have been guilty of a willful or wanton injury in running them down without attempting to stop."

* * *

"* * * charge of wanton injury, which means one consciously inflicted with reckless indiffrence to the consequences. Staub v. Public Service R. Co., 97 N. J. L. 297, 117 A. 48, Restatement, Torts sec. 500."

In *Kowaleski* v. *Pennsylvania R. Co.*, the Court below stated at 22 F. Supp. 565, 568 (D. C. N. J. 1938):

"From what may be gleaned from the allegations one cannot discern whether or not it was within the power of the decedent to remove himself from the zone of danger. Surely, if that were true the dictates of public policy would command that the burden of avoiding the accident would be upon the decedent rather than the operator of the moving train. On the other hand, if the decedent were unable *absolutely* to remove himself from the point of danger it should have been alleged that he was vainly attempting to extricate himself, that the engineer of the oncoming train was in a position to observe his predicament so many yards from the victim, that it was reasonably within his power to avoid the accident, but that he disregarded this duty and willfully ran upon and injured the decedent. Allegations in this form would leave no room for conjecture. The enumeration of the chain of events would substantiate a conclusion of intentional conduct on the part of the engineer."

In the *Kowaleski* case, the defendant was absolved from liability on the application of the well known railroad rule that an engineer of a locomotive, despite his awareness of the presence of persons upon the track, is entitled to rely on the ability and intelligence of the persons upon the track to remove themselves as the train approaches. As the trial court noted in *Kowaleski*, where the person upon the

tracks is absolutely unable to remove himself, liability will be found against the railroad where a showing is made that the engineer of the train had it within his power to avoid the accident, but wilfully disregarded his duty and injured the person upon the tracks. *Kowaleski* v. *Pennsylvania R. Co.*, 22 F. Supp. 565, 568.

Under New Jersey law, a finding of wilful and wanton causation of injuries does not require proof that the defendant or its agents or employees actually perceived the plaintiff in his place of danger or actually intended to cause the injury. It is sufficient to create liability under the "wilful and wanton" test if the acts or omissions to act display a reckless disregard of the safety of others.

This was clearly so held in an opinion by Judge (now Associate Justice) WILLIAM A. BRENNAN in *King* v. *Patrylow*, 15 N. J. Super. 429, 83 Atl. 2d 639 (App. Div. 1951). In the *King* case, recovery was allowed to a mere licensee who, like a trespasser, was owed only a duty of freedom from wilful injury. The Court stated that (*King* v. *Patrylow*, 15 N. J. Super. 429, 83 Atl. 2d 639, 641):

> "The element of intent to harm the plaintiff is supplied however under the rule in effect in this State * * * by a constructive intent as to the consequence * * * so that a charge which otherwise would be mere negligence, becomes; by reason of reckless disregard of the safety of the other, a wilful wrong."

The New Jersey courts had another opportunity to consider the distinction between "negligence" and "wilfully injurious" in the case of *Wegiel* v. *Hogan*, 28 N. J. Super. 144, 100 Atl. 2d 349 (App. Div. 1953), where a father and his child were run down and killed by a motorist. Although the estates of the injured parties could have recovered a judgment merely under ordinary negligence, the defendant happened to be a bankrupt, and in order to pierce his discharge in bankruptcy, it was necessary to show that the

case involved "wilful and malicious injuries to the person" (11 U. S. C. A. Sec. 35).

The Court held that the defendant should have anticipated other vehicles and traffic while driving through the City of Bayonne, at 7:50 in the morning, and that notwithstanding this, the defendant had driven his car in a reckless manner so as to strike the two plaintiffs. There was no showing of exorbitant speed or gross violation of any traffic ordinances. It was shown that the defendant failed to stop at the scene of the accident and drove on another ten blocks, and at first denied knowing anything about the accident. The Court stated (*Wegiel* v. *Hogan*, 28 N. J. Super. 144, 100 Atl. 2d 349, 356 (App. Div. 1953):

> "The act of the defendant in driving his automobile in the manner in which he did drive it on the occasion in question, was deliberate, voluntary and intentional. In the sense that it was voluntary and intentional, it was wilful. There is no proof that he was activated by personal malice toward the two people he killed, but it is not necessary that such element exists to constitute malice in its legal sense. Where one, with reckless indifference to consequences, performs a deliberate act in the face of knowing circumstances and a high degree of probability of producing harm, the law imputes to the actor a constructive intent to inflict the injuries resulting therefrom and stamps the act as wilfully injurious rather than as mere negligence."*

---

*As the most recent authorities and commentators have noted with regard to liability in such circumstances, "the right of exclusive possession does not carry with it the privilege to engage in conduct fraught with unreasonable probability of harm to the lives and limbs of people merely because there is no consent to their presence", and where the likelihood of a trespasser's presence is proven to be considerable, the Courts have imposed a duty and liability as determined by the facts of each case. (*2 Harper and James, The Law of Tort*, 1470, 1460.)

(Continued on following page)

The evidence established the fact that the railroad knew that this area was habitually occupied by alcoholics and persons apt to be helpless and perhaps prostrate across the tracks. Knowing this, the respondent nevertheless moved its train back and forward across this area where it reasonably could have anticipated the presence of some person, without mounting any lookout and with callous disregard for the safety of those persons who might be upon its property.

The Court below was in error in sustaining the decision of the Trial Court that petitioner was barred, as a matter of law, from recovery, regardless of proven wrongful or negligent acts on the part of the railroad, and in further error in holding that there was no evidence of wilful and wanton conduct on the undisputed facts.

(Continued from preceding page)

Where a railroad has injured pedestrians walking along a well defined path along the tracks used by the public at large, or even lying prone across the tracks next to a well defined path, numerous jurisdictions have held the railroad liable, despite common law or statutory provisions in such jurisdictions holding the injured parties to be trespassers upon the railroad's property at the time of injury. See, *Jones* v. *Atlanta-Charlotte Air Line R.R. Co.*, 218 S. C. 537, 63 S. E. 2d 476; *Murphy* v. *Wabash R.R. Co.*, 228 Missouri 56, 128 S. W. 481, 487; *Brooks* v. *Terminal R.R. Assoc.* (Missouri) 276 S. W. 2d 600, 606; *Smith* v. *Boston & Maine R.R.*, 87 N. H. 246, 177 Atl. 729, 735; *Francis* v. *Baltimore & Ohio R.R. Co.*, 247 Pa. 425, 93 Atl. 490, 491.

POINT III

The New Jersey Revised Statutes, as applied, was in violation of the Statutes of the United States and of the State of New Jersey, by granting special immunity to a tort feasor not enjoyed by other classes of tort feasors, and denying to petitioner the right to indemnity in damages for wrongful inflicted injuries.

The evidence in this case demonstrated that the site on which the accident occurred was a field and path commonly used by pedestrians. The path ran alongside the railroad tracks. The tracks were used for the backing and coupling of railroad cars. The railroad trackage was in the midst of an urban area.

The usage of the field and path alongside the tracks by pedestrians, and particularly by drunks and such persons likely to be unable to care for themselves, was of long standing and was known to the defendant as admitted by their trainmen. Such usage was in no way forbidden or prevented by the respondent, as testified by the long time residents of the area. The very path on which the petitioner was found, two or three feet from the track, with his leg cut off, was an historical path which ran along the Old Morris Barge Canal, which Canal had apparently been transformed in modern times into the respondent's railroad tracks.

The learned Court below apparently felt that the urban surroundings, the common usage of the area adjacent to the railroad tracks, the constant backing and coupling of cars by the railroad, and the known presence of pedestrians and helpless persons, could not affect the broad application of the statute.

If such holding is correct, then the statute itself is arbitrary and unreasonable for it extends the privilege of ex-

emption from liability to a railroad landowner in an unjustifiable manner where such privilege is not extended to any other landowner.

Whatever may be the reasonable grounds for granting sanctity from liability to a railroad with regard to open rights of way in less crowded or country areas or where long trains are being conducted from city to city, there is no such reasonable basis for the statutory immunity in the facts and circumstances of this case.

If the statute's broad language requires arbitrary application to all of the railroad's activities, regardless of the facts and circumstances, the broadness and vagueness of the statute destroys its reasonability and validity and its application in this case cannot be deemed to meet the requirements of constitutionally valid statutes.

The respondent ran a four car train back and forth through an urban area well known by it to be used by pedestrians and drunks, without any lookout or leadman. This resulted in severe injury to a man lying prostrate across the track, at approximately 12 noon of a bright September day, 150 feet from the public street, the train was then engaged in crossing.

It is reasonable to assume that had the respondent's trainmen paid any attention to the direction in which they were moving the train, they would have seen the petitioner and avoided the injury.

A statute which, in effect, constitutes a complete defense in such circumstances does violence to the fundamental law of liability for torts under the common law, as it existed prior to the adoption of the Federal or State Constitutions. This petitioner would undoubtedly have had a recovery in the absence of this statute and prior to the adoption of its predecessors. It is respectfully submitted that a statute which strips a person of his common law rights of recov-

ery, grounded in fundamental law, constitutes an unconstitutional deprivation of property without due process of law and is, therefore, an invalid and unenforceable statute.

CONCLUSION

Petitioner respectfully submits that the questions presented herein merit the attention of this Honorable Court and that the petition for a writ of certiorari should be granted herein.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

[APPENDIX FOLLOWS]

APPENDIX

Opinion of the Court

(Filed—October 24, 1960)

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,238

CLAUDE MACK,

Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued October 6, 1960

Before BIGGS, *Chief Judge*, and HASTIE and FORMAN, *Circuit Judges*

PER CURIAM.

The appeal at bar is without merit. It is clear that the appellant, Mack, when he sustained his injuries, was a tres-

passer on the Railroad's property, and that, as such, he was within the purview of N.J.S.A. 48:12-152 which, in substance, is a bar to recovery by trespassers, against a railroad, based upon the negligence of the latter. As the defendant Railroad conceded at pretrial, it cannot invoke the provisions of this statute if it wilfully and wantonly injured the plaintiff. Kowaleski v. Pennsylvania Railroad Co., 103 F. 2d 827 (3 Cir.), cert. den. 308 U. S. 556 (1939); Staub v. Public Service Railway Co., 97 N. J. L. 297, 300, 117 A. 48, 49 (1922); Egan v. Erie Railroad Co., 29 N. J. 243, 254, 148 A. 2d 830, 836 (1959). We find no evidence in the record, however, that would have supported a finding that Mack sustained injuries because of wilful and wanton conduct on the part of the Railroad.

The judgment appealed from will be affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,238

CLAUDE MACK,

Appellant,

v.

LEHIGH VALLEY RAILROAD COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: BIGGS, *Chief Judge*, and HASTIE and FORMAN, *Circuit Judges*

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

Judgment

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

IDA O. CRESKOFF,
Clerk.

October 24, 1960

RECEIVED & FILED

Oct. 24, 1960

IDA O. CRESKOFF,
Clerk